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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1958

No. 658

MAURICE B. BALDWIN and LA RUSSA M. BALDWIN,
Petitioners,

VERSUS

THE BOARD OF TAX-ROLL CORRECTIONS OF OKLAHOMA COUNTY and W. T. BILL HALE, COUNTY TREASURER OF OKLAHOMA COUNTY,
Respondents.

MEMORANDUM IN REPLY TO "RESPONDENTS' BRIEF IN ANSWER TO PETITIONERS' BRIEF"

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February, 1959.

OKLAHOMA TYPESETTING CO., 15 SO. WALKER, OKLAHOMA CITY, PH. FO 2-0783

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Due to the highly irregular procedure of counsel for the respondents, it appears necessary to burden the Court with this memorandum, replying to the second brief filed by opposing counsel herein.

It had not been deemed necessary to reply to the brief served upon us on February 13, 1959—a brief permitted under Rule 24, paragraph 1—inasmuch as all matter therein was fully covered by the Petition for Writ of Certiorari.

However, on February 18, 1959, these counsel were served with another brief denominated "Respondents' Brief

in Answer to Petitioners' Brief", although no such latter document had been presented by us (and, if presented, would have been rejected by the Clerk under paragraph 3 of Rule 23). On inquiry made to the Clerk, we were informed that this latter brief of opposing counsel had been accepted for filing, notwithstanding the non-existence of the brief which it purports to answer. And, since this latter dissertation of opposing counsel obviously seeks to induce prejudgment of the issues on their merits—rather than upon the propriety of assumption of jurisdiction—its acceptance for filing compels this memorandum in reply.

In presenting this memorandum, however, petitioners do not presume to present their argument in the comprehensive detail which would be advanced on plenary consideration, merely endeavoring to protect themselves from any adverse impact possibly occasioned not only by the irregularity of the procedure adopted by respondents' counsel but also by the sophisms in which they indulge.

From a perspective viewpoint, the brief of respondents actually emphasizes the propriety of this Court assuming jurisdiction. They concede that the Federal statute (34 Stat. 269, section 3), upon which Petitioners found their claim of exemption has its counterpart in similar Federal enactments applying to nine other states (Brief, pp. 16-17). But the gist of the argument of the respondents is to divert attention from the *statutory* exemption and to seek consideration of the controversy as though petitioners were urging an *inherent immunity*.

Although similar considerations of governmental policy support the Congressional right to legislate a statutory

exemption as those upon which is founded the doctrine of inherent immunity, the two legal questions are distinctly different.

It is upon this difference that the principal authorities which respondents cite are distinguishable from the instant case.

In *Spohn* v. *Stark, County Treasurer*, 197 Ind. 299, 150 N.E. 787, a claim was made that certain property *leased to the State* was exempt under a *State* statute. The Supreme Court of Indiana held that the statute providing for exemptions were based upon the *immunity of the owner* rather than upon *the use of the property itself*. The fact that the reasoning of the Indiana decision is contrary to the weight of authority, including Oklahoma itself (*Cox* v. *Dillingham*, 199 Okla. 161, 184 P.2d 976; *Board of Commrs.* v. *Tulsa Business College*, 150 Okla. 197, 1 P.2d 351) is quite immaterial to the issues here. If the Indiana statutes make ownership, rather than use, the test of the exemption, such is not controlling upon the construction of the intent of the Federal statute here involved.

The elementary inquiries here are (1) *the subject of the tax* from which exemption is sought, and (2) the factors which the statute makes determinative of the exemption which it prescribes.

Respondents seek to divert attention from these fundamental issues by injecting (1) the absence of the Federal Government as a party and its protection by the lease provision that "the lessor shall pay all taxes", (2) the fact that the Government is leasing "the building only and not

the real estate", and (3) the element of profit to the lessors, surreptitiously asserting—*de hors* the record and contrary to fact—that petitioners "operate" the property,

As to the first of these, it should be noted that the Federal statutory provision here involved does *not* purport to exempt *the Federal Government,* which is inherently immune anyhow. It states that "no taxes shall be imposed by the State on LAND or PROPERTY". And, under Oklahoma law, the tax here at issue is levied upon *property in rem,* including all interests therein. (68 Okla. Stat. 1951, Sec. 15.3; *Davis* v. *Taylor,* 194 Okla. 565, 153 P.2d 231.) The Oklahoma tax is wholly unconcerned with the element of ownership, as is the Federal statute in declaration of the exemption.

The wisdom or lack of prudence in restricting consideration to the property itself is not a matter of judicial concern unless the power of Congress so to legislate be drawn into question—and if that be done, the assumption of jurisdiction by this Court becomes virtually imperative. It is conceded that no *inherent immunity* extends to property belonging to a Federal instrumentality (*Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore,* 195 U.S. 375), but the Congressional authority affirmatively to legislate an exemption of such property transfers the judicial inquiry to an entirely different facet of constitutional law. (See: *United States* v. *Allegheny County,* 322 U.S. 174; *Federal Land Bank* v. *Bismarck Lumber Co.,* 314 U.S. 95; and *Pittman* v. *Home Owners' Loan Corp.* 308 U.S. 21).

The presence or absence of the Federal Government as a party to this litigation can have no bearing upon the

determination of whether or not the Federal statute exempts the property itself.

The holdings in *Ken Realty Company* v. *Johnson, Treasurer*, 138 F.2d 809, in *Baltimore Shipbuilding & Dry Dock Co.* v. *Baltimore, supra*, 195 U.S. 375, in *Heiner* v. *Colonial Trust Co.*, 275 U.S. 232, and in *Boss* v. *Polk County*, 236 Iowa 894, 19 N.W.2d 225, all were concerned with *inherent immunity;* none of them even considered a Federal statutory provision such as is contained in the Oklahoma Enabling Act, for no such statute was there involved.

It was both misleading and unfair of counsel for the respondents to assert (Brief, p. 18) that petitioners had not presented to the Oklahoma Supreme Court the contention that petitioners were entitled to the benefit of the exemption as an incident of their ownership of the property. The very foundation of the litigation is the complaint of the petitioners that the State was seeking to subject their title to a cloud prohibited by a Federal statute.

Opposing counsel appear to have reverted to long-abandoned 19th Century concepts in their remarks about "white" and "Indian" owners of property when seeking to distinguish the controlling effectiveness of *Choate* v. *Trapp*, 224 U.S. 665; *Ward* v. *Board of County Commrs. of Love County*, 253 U.S. 17, and *Carpenter* v. *Shaw*, 280 U.S. 363. Even a superficial examination of those decisions will disclose that the persons complaining of the attempted taxation were *not* asserting their exemption as Indian wards of the Federal Government or seeking to capitalize upon any doctrine of "white guardianship." They were advancing a Congressional statutory exemption which inured to

them as citizens *sui juris*, an exemption inhering in their ownership of property shielded from the impact of the State taxing power by Federal law.

As in those cases, the element of profit to the owner of the property is as immaterial as the identity of the owner. It is the *rem* itself which is declared to be exempt; and if the State desires to reach the profits, it must select *them* as the subject of the tax, leaving any claim for exemption of *that subject* to determination of whether or not an *immunity* or a *different* statutory exemption exists.

As to the claim of the respondents that the Government is leasing "the building only and not the real estate", they apparently disregard the non-Federal holding of the Oklahoma Supreme Court in this very litigation (Petition for Writ of Certiorari, Appendix, p. iv). The Oklahoma Court held that the failure of a lease to cover the entire of an assessed unit would not operate to prevent the operation of an exemption of a portion of the property if the exemption were valid.

And, in this connection, it should be noted that the wording of the Federal statute here under consideration is not limited to real estate alone. The prohibition is against State taxation of "LAND OR PROPERTY." So, since the property rights in the building are included in the single assessment of the real estate as a unit, as heretofore shown, respondents cannot evade the effectiveness of the Federal statutory exemption of the Federally-used building by the subterfuge of ignoring the element of value of the improvements in the single assessment made.

As to the surreptitious injection of the idea that Petitioners are "operating" the property (Brief, p. 2), we need only repeat the remark made in the Petition for Writ of Certiorari—it would be quite appropriate to speculate on the dire consequences to the petitioners should they attempt to exercise any privileges (even incident to "operation") in the premises leased to the Post Office Department.

In conclusion, it should be pointed out that the "charitable use" decisions advanced by the respondents, and the Oklahoma *statute* (68 Okla. Stat. 1951, Sec. 152), seeking to limit the Oklahoma constitutional exemption (Okla Const. Art. X, Sec. 6) of charity-used property, merely serve to emphasize the propriety of plenary consideration of this litigation.

The meaning and scope of the *Federal statutes*—not a State statute or constitutional provision—are the issues here. Whether the Federal statutes, of which the Oklahoma Enabling Act is only one, made the *property* the *subject* of the exemption and made the *use* (or reservation for use) the *classification determinant* unquestionably is a Federal question of widespread effect; and a denial of a Writ of Certiorari would leave undetermined the legal principles which so vitally affect the amount of lease rentals which the United States will be obliged to pay for property which it ill can afford to purchase.

These counsel believe that, on plenary consideration after complete briefing and argument, the efficacy of the exemption as claimed can be established to the satisfaction of the Court. But, even if this could not be done, denial of the writ without such consideration would leave un-

restrained the multiplicity of litigation inevitably engendered by the Oklahoma Supreme Court decision on this question of first impression.

Respectfully submitted,

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